



**Legislative Department
Seattle City Council
Memorandum**

Date: November 10, 2010

To: Sally Clark, Chair
Tim Burgess, Vice Chair
Sally Bagshaw, Member
Committee on the Built Environment (COBE)

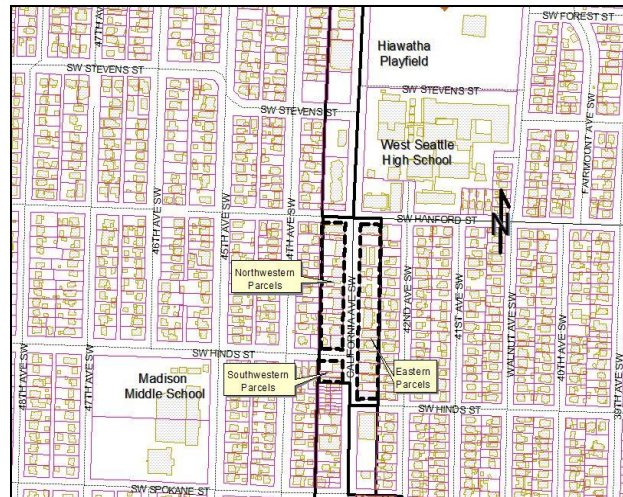
From: Michael Jenkins, Council Central Staff

Subject: **Clerk File (CF) 308944:** Petition of Josh Stepherson to rezone 152,755 square feet of land at 3210 California Av SW from NC1-30 to NC2-40 (Project No. 3007538, Type IV).

Overview

Josh Stepherson (“Applicant”), proposes to rezone 152,755 square feet of land addressed at 3210 California Ave SW. Almost all of the rezone is located in the Admiral Residential Urban Village, along California Ave SW.

As reflected in this map, the north rezone boundary is SW Hanford Street. The west rezone boundary is an alley between California Ave SW and 44th Ave SW, while the east rezone boundary is a shared property line with single-family residences that face 42nd Ave SW.



The south rezone boundary is staggered due to a change in the platting pattern. The southwest corner includes three lots at the corner of California Ave SW and SW Hinds Street, abutting a Lowrise 3 residential zone that includes a residential/commercial overlay (L3-RC¹). RC overlay zones allow for commercial uses in residential zones of up to 4,000 square feet if they are included within a residential structure. The southeast corner terminates along SW Hinds Street and along the shared property line approximately 100 feet east of California Ave SW.

¹ These lots will be remapped to the proposed Lowrise 3 (LR3) zone if the update to the Lowrise Code (Council Bill 117014) is adopted. This legislation would not change development standards related to the residential/commercial overlay.

All of the lots in the rezone area are zoned Neighborhood Commercial 1 with a 30 foot height limit (NC1-30). NC1-30 is a zone that allows for both residential and commercial development. While the height limit in the zone is 30 feet, buildings that combine commercial at the ground level with residential above have a 34 foot height limit.

If approved, the rezone would change the zoning to Neighborhood Commercial 2 with a 40 foot height limit (NC2-40). The NC2-40 zone allows for buildings that are 40 feet in height. Similar to the NC1-30 zone, if buildings in this zone provide commercial uses at the base and residential units above, an additional 4 feet of height (totaling 44 feet) is permitted.

In both zones, up to 16 feet in height is allowed above the height limit for rooftop features such as stair and elevator penthouses. Mechanical equipment can extend up to 15 feet above the height limit. These features can cover 20% of a rooftop or 25% if the mechanical equipment is screened.

Facts related to the rezone

- This is a general rezone petition. General rezones are not accompanied by a specific development proposal, but apply to all property in the proposed zone;
- Under both the current and proposed zoning, properties could be built with structures housing either single purpose residential or commercial, or a combination of both in a mixed use structure;
- The rezone is primarily located within the Admiral Residential Urban Village, with the exception of the three lots at the southwest corner of California Ave. SW and SW Hinds Street;
- The lots in the rezone area are located in the Admiral neighborhood of West Seattle and were included in a larger planning effort in the late 1990's. These planning efforts resulted in the Council's adoption the Admiral neighborhood plan (Attachment D, Hearing Examiner Exhibit 9)²;
- The Department of Planning and Development (DPD) recommended approval of the rezone with no conditions (Attachment B, Hearing Examiner's Exhibit 5). DPD also determined that the environmental impacts (SEPA) of the rezone were not significant, issuing a determination of non-significance (DNS) with the recommendation. The SEPA determination was appealed to the Hearing Examiner by the Admiral Community Council and neighbors to the rezone;
- The Hearing Examiner conducted a consolidated hearing on the rezone request and the SEPA appeal on August 18, 2010. The record was held open for receipt of remaining documents from the Council file for the rezone application. The record closed on August 23, 2010; and
- The Hearing Examiner issued a determination affirming the DNS concurrent with the recommendation to approve the rezone.

² The appellants sought to have the 1998 Admiral Residential Urban Village Plan (Hearing Examiner's Exhibit 55) included in the record. The Council when reviewing a rezone proposal can consider only the Comprehensive Plan, and its adopted Admiral Neighborhood Plan. Therefore, the exhibit was denied and the 1998 Admiral plan cannot be considered.

Type of Action – Standard of Review - No Appeal or Request to Supplement the Record

This rezone is a Type IV quasi-judicial rezone under Seattle Municipal Code (SMC) 23.76.036. Quasi-judicial rezones are subject to the Appearance of Fairness Doctrine prohibiting ex-parte communication and the Council's rules on quasi-judicial proceedings (Resolution 31001). The Hearing Examiner establishes the record for the Council at an open-record hearing. After the hearing, the record may be supplemented through a timely request to Council.

Six appeals were filed within the 14-day time period allowed for filing following the publication of the Hearing Examiner's recommendation. The six appeals, and the related responses and replies, will be discussed below.

The entire Hearing Examiner's record is kept in my office and is available for your review.

Materials from the Record Reproduced in COBE Notebooks

I have attached the following portions of the Hearing Examiner's record:

1. The Hearing Examiner's Recommendation (including the findings of fact and conclusions supporting the recommendation) (Attachment A);
2. DPD's recommendation on the rezone request, Hearing Examiner's Exhibit 5 (Attachment B);
3. Master Use Permit detailing location of structures on lots in the rezone area, Hearing Examiner's Exhibit 6 (Attachment C);
4. Admiral neighborhood plan element of the Seattle Comprehensive Plan, Hearing Examiner's Exhibit 9 (Attachment D);
5. Photographs of the buildings within the rezone area, Hearing Examiner's Exhibit 54 (Attachment E);
6. Height study along 42nd Ave SW, Hearing Examiner's Exhibit 14 (Attachment F);
7. Photo excerpts from Exhibit 1, written comments by Dino and Janet Annest (Attachment G)
8. Staff summary of key appeal points (Attachment H);
9. Copies of appeals (Attachment I);
10. Copies of responses to appeals (Attachment J); and
11. Replies to responses to appeals (Attachment K).

Summary of the record

The Hearing Examiner recommended that Council **APPROVE** the rezone request, with no conditions.

The following is a brief summary of the zoning history, the proposed development and the Hearing Examiner's conclusions.

A. Zoning history

The rezone area has been zoned for commercial uses since 1923, variously named ‘Business District’ and ‘Neighborhood Business District’. The current 30-foot height limit was adopted in 1991. Prior to that, the height limit was 40 feet from 1986-1990, 35 feet from 1957 through 1986 and 40 feet from 1923 to 1957.

Most of the rezone area is located within the Admiral Residential Urban Village, approximately ½ mile south of the intersection of California Ave SW and SW Admiral Way. The three parcels located at the southwest corner of the rezone, at SW Hinds Street and California Ave SW, are not located within the Admiral Urban Village. (Attachment D, Hearing Examiner Exhibit #9)

B. Surrounding area

The area to the north of the rezone fronting California Ave SW includes two zones. On the west side of California Ave SW, property is zoned NC2-40, with commercial and mixed use structures, while its east side is zoned SF 5000 and is made up of predominately institutional and recreation uses, including West Seattle High School, Hiawatha Playfield and St John’s Episcopal Church.

The area to the south fronting California Ave SW includes an L3-RC zone along its west side, with this area primarily devoted to multifamily uses and some small scale commercial buildings. The east side of California Ave SW south of the rezone area is zoned NC2-40 for one block, with the L3-RC zone continuing on lots further south. To the west and the east of the rezone area are SF 5000 zones with single family homes. Madison Middle School is located approximately two blocks west of the rezone area.

C. Public comment

The record contains extensive public comment provided during DPD’s review, prior to the Hearing Examiner’s hearing, and in both written and oral testimony at the hearing. Section 16 of the Hearing Examiner’s recommendation (Attachment A, Page 4) includes an overview of the public comment process that include:

- Exhibit 1 – Four-page comment letter from Dino and Janet Annest, with photos
- Exhibit 2 – A five-page petition calling for the denial of the rezone, signed by 70 individuals
- Exhibit 3 – An 11 page letter against the petition, with photographs page
- Exhibit 48 – written comments both for and against the proposal, accepted by DPD throughout their review

All six appellants provided comment throughout the review of the proposal.

D. Summary of the Hearing Examiner's conclusions

Rezone criteria require an analysis of the effect of a rezone on zoned capacity.

The Hearing Examiner noted that the proposed rezone affects property that is already zoned for commercial use. According to the Hearing Examiner, the rezone would satisfy criteria concerning zoned capacity, as the change in allowed building height (from 30 feet to 40 feet) would provide additional opportunity for residential uses and, therefore, help meet density goals within the urban village. The Hearing Examiner also noted that the rezone would not alter or affect the configuration of the commercial zone nor result in encroachment into a residential zone. The Hearing Examiner did not provide any specific comment on the additional density that could result from rezoning the three parcels at the southwest corner that are outside of the urban village.

Rezone criteria also require an analysis of two factors – whether the requested rezone meets the functional criteria for the proposed zone, and the locational criteria that address the characteristics of the surrounding area. Both sets of criteria must be satisfied in order to approve a rezone.

The Hearing Examiner concluded that the rezone meets some of the functional and locational criteria for the current NC1 zone, noting that the rezone area has:

- small scale businesses serving the adjacent residential neighborhood;
- storefronts are built to the front lot line;
- pedestrian-oriented businesses;
- close proximity to single family zones with limited buffers or transitions;
- limited to moderate transit service; and
- a mix of small and medium sized parcels (2,700 to 10,000 square feet).

The Hearing Examiner then concluded that the rezone site best matches functional and locational criteria for the NC 2 zone. In making this conclusion that Hearing Examiner noted that the rezone area:

- provides for small and medium scale businesses that serve the neighborhood;
- includes storefronts are built to the front lot line; and
- is part of a larger pedestrian oriented shopping area extending along California Ave SW, up to and beyond the intersection of California Ave SW and SW Admiral Way, offering a range of household and personal goods and services.

Pages 26-30 of the DPD Director's report include background on the type and intensity of uses permitted in the NC 1 and NC 2 zones. While both zones typically permit the same range of businesses, NC1 zoned uses are generally limited to 10,000 square feet while similar uses zoned NC 2 are limited to 25,000 square feet. The uses that fall into this category include:

- Drinking establishments
- Restaurants
- Food processing and craft work
- Medical Services
- Offices
- Retail sales and service, general
- Retail sales and service, nonhousehold

In most cases, when a use is prohibited in the NC1 zone, it is also prohibited in the NC2 zone. However, there are a few cases when a use is prohibited in NC1 but allowed in the NC2, up to 25,000 square feet, including:

- Theaters
- Sales and rental of motorized vehicles
- Sales and rental of large boats
- Light manufacturing
- Principal use parking

Following the Hearing Examiner's conclusion that the NC2-40 is the most appropriate zone for the rezone area, the Hearing Examiner then addressed the issue of existing and proposed height related to the zone.

The rezone proposal includes a request to increase the height limit from 30 feet to 40 feet. The Hearing Examiner also supported this request, noting in her conclusions that:

- A 40 foot height limit is consistent with the type and scale of development intended for an NC-2 zone;
- Making provisions for additional height to accommodate residential uses within an urban village is consistent with pedestrian character along California Ave SW;
- The heights along the California Ave SW corridor do not promote a gradual transition between the intensity of development allowed in the NC zone and to those structures permitted in the adjacent SF zone to the east;
- The lack of transitions between zones along the California Ave SW corridor is a common feature, as there are no multifamily residential zones between the commercial and single family zones; and
- Most of the views of properties to the east would be blocked if the (rezone) site was "fully built out" at the current NC1-30 zoning.

The issue of potential view loss resulting from the proposed height increase, and the related increase in intensity of development, is of particular concern to property owners to the east of the rezone. These neighbors are concerned that the height increase would cause significant impacts and, accordingly, argue that the increase in height should not be approved.

There are significant grade changes along the east rezone area, with grade rising to the east from California Ave SW to 42nd Ave SW. The record includes several exhibits addressing the issue of height and view blockage, and its potential impact to the SF 5000 zoned properties to the east of the rezone area including:

- Exhibit 14 (Attachment F), a height study developed by DPD of properties along 42nd Ave SW;
- Exhibit 54 (Attachment E) photographs of buildings within the rezone area that document the grade changes along the north rezone boundary at SW Hanford Street; and
- Exhibit 1, written comment by Appellants Dino and Janet Annest, to refute DPD's assertion that views would not be blocked from the rezone. Photos from Exhibit 1 are included with this report.

Hearing Examiner's Exhibit 14 (Attachment F) documents grades at three points along 42nd Ave SW. This information is used to compare permitted building heights in the Single-family 5000 (SF 5000) zone to the east of the rezone area with permitted heights allowed under both the current and proposed zone. The data used for the analysis was provided from DPD's Geographic Information System (GIS) database. DPD's conclusion, supported by the Hearing Examiner, is that most views from properties to the east would be blocked if development in the rezone area was built to the existing a 30 foot height limit, when viewed from the third floor of a 30 foot tall residential structure allowed in the SF zone to the east. Appellant's Dino and Janet Annest challenge the data in their appeal.

As this general rezone covers all uses permitted in the zone, the specific impact of any new development on adjacent properties is unknown. However, the Hearing Examiner does conclude that existing development standards, SEPA, and design review requirements would provide the opportunity to address site specific impacts that could occur on the adjacent single family zones when new development is proposed.

The Hearing Examiner recommended approval of the request to rezone the properties from NC1-30 to NC2-40.

E. Appeals of the Hearing Examiner's recommendation

1. Appeals

Six appeals of the Hearing Examiner's recommendation were filed on the Hearing Examiner's recommendation:

The Appellants are:

- Dennis Ross
- Olivia Peck
- Dino and Janet Annest
- Cole Peck, Phil Wingard and Lisa Muller, on behalf of 53 individuals living at or near the rezone

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- Lynn McIntosh, Chris Caster and Lisa Muller (three adjacent property owners)
 - Phil Wingard

The appellants are also considered **parties of record** for the appeal.

In addition, the other **parties of record** are for this appeal are:

- Josh Stepherson, Stepherson Associates on behalf of property owners
- Shelley Bolser, on behalf of the City of Seattle Department of Planning and Development

To assist committee members in their review of the appeals, I have created a summary (Attachment H) of the main points raised by five of the six appellants concerning certain Hearing Examiner rezoning conclusions. The appeal brought by Olivia Peck does not raise issue with the Hearing Examiner's findings or conclusions but on how her written comments were reflected in the record and considered by the Hearing Examiner.

Copies of the appeals are included as Attachment I. Please note that the appeals of Lynn McIntosh, Chris Caster and Lisa Muller; Dino and Janet Annet; and Dennis Ross, have two versions with separate dates. In these cases, each submitted an update following my request to clarify the scope of their respective appeals. The amended version has a later date stamp.

Council rules require that a copy of each appeal be sent to everyone who received a copy of the Hearing Examiner's recommendation. Accordingly, 149 copies of the appeal were sent.

2. Standard of Review and Burden of Proof

In making its decision on a quasi-judicial rezoning petition the Council applies the *substantial evidence standard of review*.³ This means that the Council's decision to approve, deny or remand a recommendation must be based on substantial evidence in the record. The *Appellants bear the burden of proof* of demonstrating the Hearing Examiner's recommendation is in error.⁴

3. Requests to Supplement the Record

The Council has not received any formal motions to supplement the record. Similar to appeals, a motion to supplement the record allows a party of record to submit a response or reply to support or refute the request.

"The Council may supplement the record with new evidence or information if the Council determines that *the new evidence or information was not available or could not reasonably have been produced at the time of the open record hearing* before the Hearing Examiner."⁵ Additionally, "[t]he Council may allow *oral and written arguments based on the record*."⁶

³ S.M.C. § 23.76.056.A and Council Quasi-judicial Rule (CQR) § VI.C.5.a.

⁴ S.M.C. § 23.76.056.A.

⁵ S.M.C. § 23.76.054.E.

⁶ S.M.C. §23.76.054.F.

The Annest's written comments to the Hearing Examiner (Hearing Examiner Exhibit 1) included Global Positioning System (GPS) data and photographs to support their claim that the existing NC1-30 zone does not block height to the extent claimed by DPD. As part of their initial appeal filing, Dino and Janet Annest included amended GPS data to update the original data they provided and that was considered by the Hearing Examiner. As part of my initial review of the appeals, I sent a request to the Annest's, asking them to state if they were seeking to formally supplement the record with this information. The Annest's did not submit a formal motion to supplement the record.

In their appeal documents, the Annest's claim that the Hearing Examiner would not allow the amended data in the record at the time of the hearing, as their opportunity to make that request during the hearing had passed and that no additional opportunity to amend the record was provided. This amended data is what they now seek to include in their appeal.

After reviewing these documents, I am recommending that the Annest's additional data not be allowed in the record. The Annest's had opportunities during the hearing to submit the materials in writing through the named appellant. There is no evidence that the Annest's asked the appellant to raise the issue of correcting the written record on their behalf. There is also no evidence of claims that they attempted to contact parties after the hearing was over but while the record was still open. The hearing was concluded on August 18, 2010 but was allowed to stay open, as indicated in the Hearing Examiner's recommendation, for "receipt of the remaining documents from the Council file for the rezone application". This would have been the opportunity to submit written materials directly to the Hearing Examiner, with notice to parties of record, and make a claim why their inclusion was critical to the claims of the appellants.

The record was closed six days later on August 23, 2010. While these appellants are before the Council *Pro Se* and are not represented by an attorney or advocate, there does not seem to be any record of what would be a reasonable request, that being a request to correct the record prior to the Hearing Examiner's review and recommendation.

4. Responses to appeals

DPD and the applicant submitted separate responses to each of the appeals filed in this matter. DPD's responses are in more of a summary form than what was provided by the applicant. The applicant's responses are somewhat detailed but also include examples from the record embedded in their document. The applicant's responses include a table that references each of the appellant's claims. Both DPD and the applicant's responses underscore how the record refutes each of the appellant's claims. These are included as Attachment J.

5. Reply to responses

Three of the appellants – Annest's, McIntosh/Caster/Muller, and Peck/Wingard/Muller – developed replies to specific points raised by DPD, and the applicant to refute their claims. These are included as Attachment K. Another appellant, Phil Wingard, also submitted a reply. As Mr. Wingard's reply was not filed in a timely manner, as required by Council rules, the reply was not accepted.

Next Steps

Council must take action on appealed rezone recommendations within 120 days of the Hearing Examiner's recommendation.⁷ Consequently, Council must act on this rezone petition and appeal no later than December 30, 2010. At least one additional meeting will be required for committee members to deliberate and render a decision on the appeals, as well as to make a recommendation to Council on the rezone request. The next available COBE meetings are November 30 and December 8, 2010. The last available Council meeting is December 13, 2010.

⁷ S.M.C. § 23.76.005.C.3.b(3).